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No. 84-1652

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SAN FRANCISCO NEWSPAPER PRINTING COMPANY,
D/B/A SAN FRANCISCO NEWSPAPER AGENCY,
Petitioner,

VS.

SAN FRANCISCO WEB PRESSMEN'S UNION, NO. 4,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this case present an unresolved question of law of sufficient significance to merit the Court's review?

2. Did the Court of Appeals correctly apply the rule of judicial deference to labor arbitrations set forth in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and its progeny?

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INTRODUCTION

The Petition for a Writ of Certiorari requests review of the judgment of the Court of Appeals for the Ninth Circuit on the grounds that a final and binding arbitration award rendered pursuant to the provisions of a collective bargaining agreement destroyed Petitioner's right to discharge employees, and that, moreover, the arbitration award was internally inconsistent. Both grounds rely on an inaccurate characterization of the arbitration award and the Ninth Circuit's decision. More basically, neither of the alleged grounds, even if correct, warrants review by this Court.

The sole issue in this case is the proper interpretation of a collective bargaining agreement, a question of significance only to the parties. The judgment below correctly applied the standards of the United States Supreme Court for deference to an arbitrator's award and Petitioner's invitation to this Court to "ferret out" alleged contradictions in the award must be rejected.

STATEMENT OF RELEVANT FACTS

Michael Tenorio, an experienced journeyman pressman, began employment with the San Francisco Newspaper Agency ("Agency") in 1977. In August, 1978, Tenorio was discharged. In the following three years, the San Francisco Web Pressmen and Platemakers' Union, No. 4 ("Local 4") referred Tenorio as a "new hire" to various newspaper employers within Local 4's jurisdiction, including the Agency, pursuant to the rights set forth in Section 1 of the Collective Bargaining Agreement (Petition, Appendix F). The relevant provisions of Section 1 grant to Local 4 the right to furnish workers to the Agency's pressrooms and, if the Agency rejects a union referral, Local 4 may utilize the contractual grievance procedure.[1]

Despite Tenorio's "exemplary record subsequent to his discharge" (Petition, Appendix E, A-33), the Agency rejected him for employment on three separate occasions. Following the latest rejection in August, 1981, three years after his termination, Local 4 filed a grievance protesting the Agency's refusal to hire. This

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[1] The relevant provisions of Section 1 are as follows (Petition, Appendix F, A-37, 38):

> (f) The Union agrees to furnish at all times a sufficient number of competent persons as may be required by the Employer for the proper operation of its pressrooms. . . .
>
> (g) The Union's referral of applicants for jobs with the Employer and the hiring and terms of employment of such applicants, except as hereinbefore set forth, shall be on a non-discriminatory basis. . . .
>
> (h) The Employer shall have the right to reject any applicant for employment referred by the Union. Grievances arising from the rejection of applicants for employment shall be referred to the Joint Standing Committee for settlement.

refusal to hire was the subject ot the Arbitrator's August, 1982, Opinion and the July, 1983, Clarification and Award.

The Arbitrator's Award interprets the union referral clause contained in Section 1 of the Agreement, as well as the right to discharge employees under Section 11(c). Crucial to the Arbitrator's reasoning are contractual provisions peculiarly adapted to the newspaper printing industry, in which, typically, journeymen are provided to employers by the union.

In his Opinion (Petition, Appendix E, A-31), the Arbitrator found that, while the Agency has the right to discharge employees for the reasons specified in Section 11(c) of the Agreement, Section 1 limits the Agency's right to reject previously discharged employees who are subsequently referred for employment as new hires. (*See also,* Petition, Appendix E, at A-33.)[2]

Under Section 1, the Agency may reject such referrals only if the rejection is neither arbitrary nor capricious. Applying this

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[2] The Petition confuses the Agency's right to "discharge and permanently bar" an employee (Section 11(c)) with its duty to fairly consider new workers offered for hire by the union (Section 1(h)).Thus the Agency insists that the right to discharge "has been destroyed" by the Arbitrator's decision (Petition at 8). This is simply not the case.

That the Agency had the right to discharge Tenorio under Section 11(c) has never been at issue here. That the Agency could deny Tenorio any continuing benefits of his former employment—that is, prevent him from enjoying earned rights of seniority, vacation, or scheduling priority through reinstatement (rehire)—is not in question. Nor was the Agency forced to take back Tenorio—to "rehire" him to his former position. After discharge, Tenorio enjoyed no rights of rehire to his old position, just as the Agreement contemplated.

The Petition, beginning at page 4, interchanges the terms "rehire" and "consider for new hire," words of art within the meaning of the Agreement which clearly connote different rights and duties. Thus to assert that the Agency was under any "requirement to *rehire*" Tenorio (*Id.*), emphasis added) is in error. A "rehire" as the Arbitrator found, implied the retention of extensive employment rights, rights which Tenorio *forfeited at discharge*. Instead, the Arbitrator simply found that the Agency was under a duty to fairly consider Tenorio as a *new hire* and the Ninth Circuit Court of Appeals agreed. (See Addendum, p. 4.)

standard to the matter before him, the Arbitrator sustained the grievance because the Agency's rejection of Tenorio "was arbitrary and perfunctory in view of the staleness of the incidents of misconduct upon which the rejection rested and the failure to investigate Tenorio's exemplary record subsequent to his discharge by the Agency." *Id.*

This construction of the Agreement by Arbitrator LeProhn gives life to a contract provision, Section 1(h), which fits the structure of the newspaper printing trade and conforms to industry practice. Any alternative construction tends to abrogate, or at the least severely to constrict, a provision of the Agreement for which the parties bargained.

The Agency refused to comply with the Arbitrator's Award. By its Judgment filed February 24, 1984, the United States District Court for the Northern District of California, having previously remanded to the Arbitrator for clarification, refused to enforce the award as clarified. Local 4 appealed to the Court of Appeals for the Ninth Circuit, which reversed, concluding that the Arbitrator's reading of the contract "permits both [Sections 1 and 11 (c)] to have meaning and application" and thus "represents a plausible interpretation of the Agreement and should therefore be enforced." [Citations.] (Addendum, p. 5.)

ARGUMENT

I. THIS CASE PRESENTS NO ISSUE OF SUFFICIENT SIGNIFICANCE TO MERIT REVIEW

A. To bolster its position, Petitioner raises new issues not before the Court of Appeals

In attempting to inflate the significance of this case, the Petitioner suggests that the decision below makes inroads into management rights to discharge employees. This contention was never placed before the Court of Appeals, whose Judgment rested solely on its conclusion that the Arbitrator's Award passed the limited judicial scrutiny to which it could be subjected. Petitioner did not argue below that some general management rights were implicated, nor could it have so argued: the case concerns merely

the interpretation of specific sections of a particular collective bargaining agreement.

Even if it were appropriate to raise such an issue for the first time here, it is entirely meritless. This case involves contractual rights, not management rights—the right of a union to have a member receive consideration for hiring, not rights to discharge. The decision below requires only that, under this collective bargaining agreement, the employer refrain from acting arbitrarily and capriciously, and certainly does not, as Petitioner insinuates, require employers to hire and retain incompetent employees.

B. The issue decided by the Court of Appeals was narrowly limited to interpretation of the collective bargaining agreement

The decision of the court below has no implications for the rights of employers generally conceived. The court concluded that the Arbitrator's Award drew its essence from the collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

As this Court observed in *Nolde Brothers, Inc. v. Local 358, Bakery and Confectionery Workers Union*, 430 U.S. 243, (1977), the authority of the arbitrator derives from the contract. Thus the implications of the Arbitrator's Award herein are limited to this particular collective bargaining agreement. Once the arbitrator has interpreted the contract, the proper role of the courts is also strictly limited. A court is not "entitled to review the merits," and may not "second-guess" the arbitrator's contractual interpretation. *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 759 (1983). There is nothing in this process of private adjudication and judicial enforcement to impinge on the rights of anyone other than the parties to the agreement. Petitioner need have no fear that a "cherished right [of discharge]" has been lost (Petition at 8).

C. The decision below does not conflict with *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275 (1946)

Petitioner asserts that the decision below is in conflict with the decision in *Fishgold, supra*. But the issues presented herein are

wholly unrelated to those decided in *Fishgold* and even insofar as *Fishgold* and this case share one relevant fact—the existence of a discharge—the case at bar is entirely in accord with the definition set forth in *Fishgold.*

1. *Fishgold* concerned rights to job security granted by Congress during World War II to veterans returning from service. The task for the Court was to determine an employee's statutory right. That inquiry was, of course, conducted *de novo* under a far different standard of review from that appropriate for an arbitrator's award.

2. A crucial issue in *Fishgold* was the distinction between a discharge and a layoff. That issue was not even presented to the Court of Appeals or in the arbitration herein. Rather, the issue was the manner in which, under the contract, the employer could reject persons offered for hire by the union.

3. In *Fishgold,* as in the instant case, there was a discharge. Here, the grievant had been fired three years earlier by the Agency—that is not disputed. The *discharge* conformed in all respects to the *Fishgold* definition. The grievant lost his job with no expectation of return to his old position nor of enjoying the continuing benefits of his former employment, *e.g.,* earned rights of seniority, vacation, or scheduling priority. That Local 4 offered him as a new hire *did not* imply that any of his old rights would be restored. Moreover, the employer *did not* have any absolute duty to hire a worker proffered by Local 4; it need only have given him fair consideration.

4. Presuming, *arguendo,* that some right of discharge could be extracted from *Fishgold* in a *statutory* context, here the question is the degree to which Petitioner agreed to limit or condition its right through its specific collective bargaining agreement with Local 4. Local 4 asserts no independent right to have its members considered for hire. It won that right at the bargaining table, and it is there that Petitioner should look to change the referral rights of which it complains.

II. THE COURT OF APPEAL'S DECISION CORRECTLY APPLIED THE COURT'S TEACHINGS REGARDING DEFERENCE TO ARBITRATION

A. The rule of deference to arbitration awards was properly invoked

The issue argued before the lower court in this case was the degree of deference due an arbitrator's decision under *Enterprise Wheel & Car, supra,* and its progeny. A number of considerations have led the Court to draw a strict line discouraging judicial review of the merits of such decisions. *Enterprise Wheel & Car* emphasizes the clear statement of Congressional intent to encourage private settlement of labor disputes, as well as the desirability of drawing upon the specialized expertise of arbitrators. More recently, *Nolde v. Bakery Workers, supra,* adds the observation that, in part because of this Court's deference, parties to collective bargaining agreements have come to expect that the merits of arbitrator's decisions will not be reviewed. And, of course, the very volume of cases handled by arbitrators counsels against making judicial review more readily available.

This deferential standard, mandated by this Court's unchanging precedent, was precisely that applied below. The court relied on *Enterprise Wheel & Car, W.R. Grace, supra,* and *George Day Construction Co. v. United Brotherhood of Carpenters,* 722 F.2d 1471 (9th Cir. 1984), in concluding that the award was a "plausible interpretation of the [contract]."

B. The decision below is not inconsistent with rulings in other Circuits

Petitioner suggests (Petition at 10) that "the Ninth Circuit ignored its responsibility to ferret out internally contradictory awards . . ." when it affirmed the Arbitrator and "thus conflicts" with various Circuit Court decisions. This contention is without merit. The Memorandum deals precisely and carefully with the issue of whether the Award was logically inconsistent. Having reviewed the Arbitrator's treatment of the Sections of the Agreement disputed by the parties, it concluded "[t]he Arbitrator's interpretation of the interaction of Sections 1 and 11(c) of the

Agreement permits both sections to have meaning and application. . . ." (Addendum, p. 5.) Thus, the court concluded, "[t]he Award represents a plausible interpretation of the Agreement and should therefore be enforced. [Citation.]" The Court's analysis, designed to insure that the award is not "incomplete, ambiguous, or contradictory," *Bell Aerospace Co., Div. of Textron v. Auto Workers, Local 516*, 500 F.2d 921, 923 (2d Cir. 1974) is identical to that applied by all of the circuits. There is no conflict.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied. The issue has already been decided correctly on its facts and wise judicial and Congessional policy join to caution against intervention in private arbitration disputes.

Respectfully submitted,

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ADDENDUM

United States Court of Appeals
For the Ninth Circuit

No. 84-1711

DC No. C 83-4648 EFL

San Francisco Newspaper Printing
Company, Inc., d/b/a San Francisco
Newspaper Agency,
Plaintiff-Counterdefendant/
Appellee,

vs.

San Francisco Web Pressmen's
Union No. 4
Defendant-Counterclaimant/
Appellant.

[Filed Jan. 22, 1985]

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Honorable Eugene F. Lynch, Presiding

Argued and Submitted December 10, 1984

BEFORE: CANBY, NORRIS and BEEZER, Circuit Judges.

Federal courts have a very limited scope of review when passing on the validity of a labor arbitration award. The award must be enforced "so long as it draws its essence from the collective

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

bargaining agreement." *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). This deference to the arbitrator's decision advances the Congressional policy of peaceful resolution of labor disputes through binding arbitration by investing the decision with finality. Moreover, it is consistent with the parties' intent, evinced by an arbitration clause in their collective bargaining agreement, to have disputes concerning constructions of the contract resolved by an arbitrator. *W. R. Grace & Co. v. Local 759, International Union of United Rubber Workers*, 461 U.S. 757, ____, 103 S.Ct. 2177, 2182 (1983).

An arbitrator's award "draws its essence from the collective bargaining agreement," and must therefore be enforced, if it "represents a plausible interpretation of the contract." *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275, 1278-79 (9th Cir. 1982). This remains so even if the basis for the decision is ambiguous, *W. R. Grace*, 461 U.S. at ____,103 S.Ct. at 2182, or if no reason for the award is provided. *Steelworkers*, 363 U.S. at 598 ("Arbitrators have no obligation to the court to give their reasons for an award."). A federal court is not at liberty to review the merits of the award nor to substitute its own preferred interpretation in place of the arbitrator's. *Edna H. Pagel*, 667 F.2d at 1278. If on its face the award represents a plausible interpretation of the contract, judicial inquiry must cease and the award must be enforced. *George Day Construction Company v. United Brotherhood of Carpenters*, 722 F.2d 1471, 1477 (9th Cir. 1984). This court must review the award, as did the district court, under this narrow standard. *Id.*

The issue before Arbitrator LeProhn was whether appellee San Francisco Newspaper Agency (the "Agency") had violated the referral clause by rejecting Tenorio as a new hire on the basis of his prior discharge and without inquiring into his present capabilities as an employee. To resolve the issue Arbitrator LeProhn had to interpret and reconcile seemingly contradictory provisions of the Collective Bargaining Agreement (the "Agreement"): on the one hand, Section 1(f) which accords appellant San Francisco Web Pressmen's Union No. 4 (the "Union") the right to refer persons to the Agency, and Section 1(h) which provides the

Union with a cause of action to grieve the rejection of a referral; and, on the other hand, Section 1(h) which affords the Agency the right to reject any applicant referred by the Union, and Section 11(c) which provides that the Agency may discharge an employee for one of four enumerated reasons. The question for this Court is whether the Arbitrator's interpretation of those provisions is plausible. We conclude that it is.

The Arbitrator examined Section 1(f) and observed that "the Agreement provides that the first source of new employees shall be competent journeymen referred by the Union . . . ." Clarification of Opinion and Award, July 7, 1983, at 2 ("Clarification"). He continued, "while the Agency has the right to reject applicants referred by the Union [under Section 1(h)], rejections are subject to the grievance procedure [Section 1(h)]." *Id.* By including the failure to hire referred applicants within the purview of the grievance procedure, the Arbitrator concluded, the parties implicitly adopted some standard for determining whether the Agency's rejection of an applicant was appropriate. *Id.* The Agreement, however, was silent as to the specific standard. Arbitrator LeProhn choose to employ a good faith test, the standard typically applied by arbitrators to refusal to hire cases when the agreement is silent. Opinion and Award, August 12, 1984, at 20 ("Award"). He thereby concluded that under the Agreement, the Agency may reject an applicant only so long as the rejection is not arbitrary or capricious but is, instead, grounded upon a good faith belief that the applicant is not competent to be employed. Contrary to the Agency's urgings, he refused to find that Subsection 1(h) empowered the Agency to reject any pressman supplied by the Union, the applicant's competence notwithstanding, for that would vitiate the Union's right to staff the job with competent journeymen it refers as well as its right to grieve the propriety of any specific rejection. Clarification at 3.[1]

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[1] In reaching his conclusion, the Arbitrator relied in part on *Newark Publishers' Assn.*, 43 Lab. Arb. 245 (1963)(Smertz, Arb.), a case in which the arbitrator reached a similar result on the basis of comparable contractual provisions.

The Arbitrator further concluded that this limitation on the Agency's right to reject applicants applies to all applicants referred by the Union regardless of their previous employment status. In other words, Section 11(c) does not exempt previously discharged employees from the operation of Section 1. The Arbitrator read Section 11(c) to mean the Agency has the right "to effect discharges, i.e., to announce at the time of the disciplinary action that the individual is 'permanently barred,' not subject to rehire." Award at 15. A "permanent bar," he noted, is a term of art in the newspaper industry which is merely the equivalent of a conventional discharge. Award at 14. Thus, a permanently barred individual has no right to be reinstated to his former position with a restoration of privileges such as seniority, vacation and scheduling priority rights. If referred out and accepted he must start anew. That is not to say, however, that the Union loses its rights embodied in Section 1. To the contrary, the Union has the right to refer previously discharged employees, and such applicants, like all referrals, must be fairly considered under standards which are neither arbitrary nor capricious.[2] The rights of Section 1, he found, cannot be defeated merely by pointing to an applicant's prior discharge. Previous discharge is only one relevant consideration.

Applying his interpretation of the Agreement to the facts before him, Arbitrator LeProhn found that the rejection of Tenorio's referral in 1981 rested exclusively upon his prior discharge and violated Section 1(h) of the Agreement.

> "The rejection was arbitrary and perfunctory in view of the staleness of the incidents of misconduct upon which the rejection rested and the failure to investigate Tenorio's job-related conduct subsequent to his discharge, which would have evidenced his rehabilitation, and in view of Tenorio's

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[2] Contrary to the district court's assertion, the Arbitrator did not determine "that the Agency has a right to permanently bar an individual and at the same time determine that this right might be vitiated *any time* a permanently barred individual is subsequently referred by the Union for rehire." District Court Order of February 24, 1983, at 4 (emphasis added).

> exemplary record subsequently to his discharge by the Agency."

Award at 21.

The Arbitrator's interpretation of the interaction of Sections 1 and 11(c) of the Agreement permits both sections to have meaning and application when a previously discharged employee subsequently is referred for employment with the Agency. Whether or not it is the best or preferred interpretation is irrelevant. The Award represents a plausible interpretation of the Agreement and should therefore be enforced. *George Day*, 722 F.2d at 1477.

REVERSED and REMANDED for entry of judgment enforcing the arbitrator's award.